

St. John's Law Review

Volume 54
Number 4 *Volume 54, Summer 1980, Number 4*

Article 3

July 2012

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Recommended Citation

Licata, Clara S. (1980) "Beyond the Bennett Amendment: Establishing a Prima Facie Case of Sexual Discrimination in Compensation Under Title VII," *St. John's Law Review*. Vol. 54 : No. 4 , Article 3.
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol54/iss4/3>

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NOTES AND COMMENTS

BEYOND THE BENNETT AMENDMENT: ESTABLISHING A PRIMA FACIE CASE OF SEXUAL DISCRIMINATION IN COMPENSATION UNDER TITLE VII

INTRODUCTION

The Equal Pay Act of 1963¹ (EPA or the Act) prohibits an employer from paying a lower wage to employees of one sex than it pays to those of the opposite sex for performing jobs which require "equal skill, effort, and responsibility, and which are performed under similar working conditions."² Although an employee suing under the Act need not prove that the alleged pay disparity results

¹ 29 U.S.C. § 206(d) (1976).

² *Id.* § 206(d)(1) (1976). Section 206(d)(1) provides in pertinent part:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex

Id.

Approximately 30 states have enacted the same or similar legislation banning wage discrimination based on sex. ALASKA STAT. § 23.10.155 (1972); ARIZ. REV. STAT. ANN. § 23-341 (West Supp. 1979); ARK. STAT. ANN. § 81-333 (Supp. 1979); CAL. LAB. CODE § 1197.5 (West Supp. 1980); CONN. GEN. STAT. ANN. § 31-75 (West 1972); HAWAII REV. STAT. § 387-4 (1976); IDAHO CODE § 44-1702 (1977); ILL. ANN. STAT. ch. 48, § 4A (Smith-Hurd Supp. 1979); IND. CODE ANN. § 22-2-2-4 (Burns 1979); KY. REV. STAT. § 337.423 (1979); ME. REV. STAT. ANN. tit. 26, § 628 (1974); MASS. GEN. LAWS ANN. ch. 149, § 105A (West 1971); MICH. STAT. ANN. § 17.255(17) (1975); MINN. STAT. ANN. § 181.67 (West Supp. 1980); NEB. REV. STAT. § 48-1221 (1978); NEV. REV. STAT. § 608.017 (1975); N.H. REV. STAT. ANN. § 275:37 (1977); N.J. STAT. ANN. § 34:11-56.2 (West 1965); N.Y. LAB. LAW § 194 (McKinney Supp. 1979-1980); N.D. CENT. CODE § 34-06.1-03 (1972); OHIO REV. CODE ANN. § 4111.17 (Page Supp. 1979); OR. REV. STAT. § 652.220 (1977); PA. STAT. ANN. tit. 43, § 336.3 (Purdon Supp. 1979-1980); R.I. GEN. LAWS § 28-6-18 (1979); S.D. CODIFIED LAWS ANN. § 60-12-15 (1978); TENN. CODE ANN. § 50-321 (1977); VA. CODE § 40.1-28.6 (1976); WASH. REV. CODE § 49.12.175 (1976); W. VA. CODE § 21-5B-3 (1978); WYO. STAT. § 27-4-302 (1977).

from the employer's discriminatory motives,³ the Act provides for relief only in those cases where an employee is able to prove that his job is "substantially equal" to a job held by a member of the opposite sex.⁴

In an attempt to circumvent the substantially equal standard of the EPA, employees who have been victims of sexual discrimination in compensation have often sued under section 703 of Title VII of the Civil Rights Act of 1964,⁵ which, in general, prohibits discriminatory employment practices.⁶ Indeed, the language of Title VII is broad enough to encompass controversies not involving substantially equal jobs,⁷ although in certain cases under Title VII,

³ See *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974); *Hodgson v. American Bank of Commerce*, 447 F.2d 416, 420 (5th Cir. 1971); *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 266 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970); *Ross & McDermott, The Equal Pay Act of 1963: A Decade of Enforcement*, 16 B.C. INDUS. & COM. L. REV. 1, 21-22 (1974). See also 29 C.F.R. § 800.115 (1979).

⁴ Although a literal reading of the Act would appear to require that the jobs performed by male and female employees be absolutely equal in skill, effort and responsibility, 29 U.S.C. § 206(d) (1976), it is now settled that properly construed, the statute imposes a standard of "substantial equality," see note 22 *infra*. Mere comparability of jobs, however, is insufficient to establish a *prima facie* case under the Act. *Christopher v. Iowa*, 559 F.2d 1135, 1138 (8th Cir. 1977); *Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164, 1176 (3d Cir. 1977); *Taylor v. Franklin Drapery Co.*, 441 F. Supp. 279, 285 (W.D. Mo. 1977); see *Usery v. Richman*, 558 F.2d 1318, 1321 (8th Cir. 1977).

⁵ 42 U.S.C. § 2000e-2 (1976)

⁶ *E.g.*, *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945 (10th Cir. 1980); *Gunther v. County of Wash.*, 623 F.2d 1303 (9th Cir. 1979), *cert. granted*, 49 U.S.L.W. 3322 (U.S. Nov. 4, 1980) (No. 80-429); *Roesel v. Joliet Wrought Washer Co.*, 596 F.2d 183 (7th Cir. 1979); *Pantchenko v. C.B. Dolge Co.*, 581 F.2d 1052 (2d Cir. 1978); *DiSalvo v. Chamber of Commerce*, 568 F.2d 593 (8th Cir. 1978); *Christensen v. Iowa*, 563 F.2d 353 (8th Cir. 1977); *Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977); *Calage v. University of Tenn.*, 544 F.2d 297 (6th Cir. 1976); *Orr v. Frank R. MacNeill & Son, Inc.*, 511 F.2d 166 (5th Cir.), *cert. denied*, 423 U.S. 865 (1975); *Ammons v. Zia Co.*, 448 F.2d 117 (10th Cir. 1971); *Kohne v. IMCO Container Co.*, 480 F. Supp. 1015 (W.D. Va. 1979); *IUE v. Westinghouse Elec. Corp.*, 19 Fair Empl. Prac. Cas. 450 (D.N.J. 1979), *rev'd*, 23 Fair Empl. Prac. Cas. 588 (3d Cir. 1980); *Lemons v. Denver*, 17 Fair Empl. Prac. Cas. 906 (D. Colo. 1978), *aff'd*, 620 F.2d 228 (10th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3228 (U.S. Oct. 6, 1980) (No. 80-82); *Wetzel v. Liberty Mut. Ins. Co.*, 449 F. Supp. 397 (W.D. Pa. 1978); *Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252 (N.D. Ind. 1977); *Molthan v. Temple Univ.*, 442 F. Supp. 448 (E.D. Pa. 1977).

⁷ 42 U.S.C. § 2000e-2(a)(1) (1976) provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his *compensation*, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Id. (emphasis added).

it may be necessary to prove discriminatory intent.⁸ Nevertheless, a section of Title VII known as the Bennett Amendment,⁹ intended to harmonize the two acts by rendering lawful a compensation differential "authorized" by the EPA,¹⁰ has consistently been interpreted as incorporating the substantially equal standard into Title VII.¹¹ Recently, however, the proscriptive ambit of Title VII has been enlarged significantly by the Court of Appeals for the Ninth Circuit. In *Gunther v. County of Washington*,¹² the Ninth Circuit held that the Bennett Amendment merely incorporates certain affirmative defenses of the EPA into Title VII, and not the substantially equal standard itself.¹³

In light of the *Gunther* holding, subsequently approved by at least two other courts,¹⁴ this Note will explore several theories, other than equal pay for equal work, under which claims of sex-based wage discrimination may be brought under Title VII. Toward this end, the Note will commence with a discussion of the

⁸ See notes 90-91 and accompanying text *infra*.

⁹ The Bennett Amendment, codified in the last sentence of 42 U.S.C. § 2000e-2(h) (1976), provides:

It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid . . . if such differentiation is authorized by the provisions of section 206(d) of Title 29.

Id.

¹⁰ See note 45 *infra*.

¹¹ See, e.g., *Marshall v. Dallas Ind. School Dist.*, 605 F.2d 191, 196 (5th Cir. 1979); *DiSalvo v. Chamber of Commerce*, 568 F.2d 593, 596 (8th Cir. 1978); *Christensen v. Iowa*, 563 F.2d 353, 356 (8th Cir. 1977); *Orr v. Frank R. MacNeill & Son, Inc.*, 511 F.2d 166, 170-71 (5th Cir.), *cert. denied*, 423 U.S. 865 (1975); *Ammons v. Zia Co.*, 448 F.2d 117, 120 (10th Cir. 1971); *Kohne v. IMCO Container Co.*, 480 F. Supp. 1015, 1038-39 (W.D. Va. 1979); *IUE v. Westinghouse Elec. Corp.*, 19 Fair Empl. Prac. Cas. 450, 457 (D.N.J. 1979), *rev'd*, 23 Fair Empl. Prac. Cas. 588 (3d Cir. 1980); *Lemons v. Denver*, 17 Fair Empl. Prac. Cas. 906, 912 (D. Colo. 1978), *aff'd*, 620 F.2d 228 (10th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3228 (U.S. Oct. 6, 1980) (No. 80-82); *Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252, 266 (N.D. Ind. 1977); *Molthan v. Temple Univ.*, 442 F. Supp. 448, 455 (E.D. Pa. 1977).

Johnson v. University of Bridgeport, 20 Fair Empl. Prac. Cas. 1767 (D. Conn. 1979), presents an interesting twist to the majority rule that a claim under Title VII for sexual discrimination in compensation is subject to the "substantial equality" strictures of the Act. In *Johnson*, the court applied collateral estoppel to deny a Title VII claim for wage discrimination where there had already been a jury verdict for the defendant under the EPA. *Id.* at 1768-69.

¹² 623 F.2d 1303 (9th Cir. 1979), *cert. granted*, 49 U.S.L.W. 3322 (Nov. 4, 1980) (No. 80-429).

¹³ *Id.* at 1311.

¹⁴ *IUE v. Westinghouse Elec. Corp.*, 23 Fair Empl. Prac. Cas. 588 (3d Cir. 1980); *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945 (10th Cir. 1980). See note 73 and accompanying text *infra*.

EPA, Title VII and the controversy that has arisen concerning the proper interpretation of the Bennett Amendment. Following this discussion, the *Gunther* case will be analyzed, and its conclusion with respect to the effect of the Bennett Amendment will be endorsed. Finally, in view of the expansive ambit of Title VII as interpreted by the *Gunther* court, the elements of a *prima facie* case under the statute will be suggested.

THE EQUAL PAY ACT

In enacting the EPA in 1963, Congress attempted to fashion an objective standard for determining the existence of sexual discrimination in compensation.¹⁵ Pay differentials based on sex between equal rather than comparable jobs were proscribed,¹⁶ apparently out of a desire to keep the courts from engaging in job evaluation.¹⁷ Notwithstanding Congress' intent, however, the equality standard has not streamlined litigation under the Act because the standard has been given numerous different interpretations by courts applying it.¹⁸ As a consequence, EPA claims are adjudicated on a case-by-case basis¹⁹ that necessarily requires judi-

¹⁵ See 109 CONG. REC. 9197 (1963) (remarks of Rep. Goodell).

¹⁶ 29 U.S.C. § 206(d) (1976). The concept of equal pay for equal work was not novel when Congress passed the Equal Pay Act in 1963. See BNA OPERATIONS MANUAL, EQUAL PAY FOR EQUAL WORK, FEDERAL EQUAL PAY LAW OF 1963 at 3 (1963). In 1918, the Railroad Administration issued an order requiring equal pay. Elisburg, *Equal Pay in the United States: The Development and Implementation of the Equal Pay Act of 1963*, 29 LAB. L.J. 195, 195 (1978). Pursuant to the Classification Act of 1923, salary grades for federal employees were based on component job elements and were undifferentiated by sex. *Id.* Moreover, numerous equal pay bills were introduced in Congress prior to the passage of the Act in 1963, including 72 such bills between the 82nd and 86th Congresses. BNA OPERATIONS MANUAL, *supra*, at 4.

In choosing the standard of equal work, Congress was no doubt aware that a standard of comparability had been used previously during World War II by the National War Labor Board. See Gitt & Gelb, *Beyond the Equal Pay Act: Expanding Wage Differential Protections Under Title VII*, 8 LOY. CHI. L.J. 723, 734-36 (1977). Moreover, prior attempts to introduce equal pay legislation had contained a standard of comparability. See, e.g., *Hearings on H.R. 8898 and H.R. 10,226 Before the Select Subcomm. of the House Lab. and Educ. Comm.*, 87th Cong., 2d Sess. 166 (1963).

¹⁷ See 109 CONG. REC. 9197 (1963) (remarks of Rep. Goodell).

¹⁸ See notes 21-23 and accompanying text *infra*. The congressional debate itself indicates differences in understanding of the meaning of "equal work." See 109 CONG. REC. 9197, 9761 (1963). Representative Goodell stated that in substituting the word equal for comparable, Congress' intention was to narrow the concept. *Id.* at 9197. The jobs should, he stated, be virtually identical. *Id.* In the Senate, however, Senator McNamara stated that it was not the intent of the Senate that the jobs be identical. *Id.* at 9761. Such a conclusion, he observed, would be "ridiculous." *Id.*

¹⁹ See, e.g., *Brennan v. South Davis Community Hosp.*, 538 F.2d 859, 861 (10th Cir.

cial job evaluation.²⁰

In at least one early case brought under the Act, the court construed the equality standard as requiring proof that allegedly equal jobs require equal skill, equal effort, and equal responsibility.²¹ Although subsequent courts have relaxed this standard, applying instead a test of "substantial equality,"²² they are divided

1976); *Hodgson v. Golden Isles Convalescent Home, Inc.*, 468 F.2d 1256, 1258 (5th Cir. 1972).

²⁰ See, e.g., *Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164, 1169-70 (3d Cir. 1977); *Thompson v. Boyle*, 21 Fair Empl. Prac. Cas. 57, 63-64 (D.D.C. 1979); *Kohne v. IMCO Container Co.*, 480 F. Supp. 1015, 1038-39 (W.D. Va. 1979); *Wetzel v. Liberty Mut. Ins. Co.*, 449 F. Supp. 397, 402 (W.D. Pa. 1978).

²¹ See *Wirtz v. Basic, Inc.*, 256 F. Supp. 786, 790 (D. Nev. 1966). The *Wirtz* court did note, however, that "insubstantial differences" in skill, effort, and responsibility were to be ignored. *Id.*

²² *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970), was the first case under the Equal Pay Act to utilize the term "substantially equal." *Id.* at 265. The vast majority of cases after *Wheaton Glass* have adhered to the substantially equal standard. See *Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164, 1175 (3d Cir. 1977); *Brennan v. South Davis Community Hosp.*, 538 F.2d 859, 861 (10th Cir. 1976); *Brennan v. Owensboro-Davies County Hosp.*, 523 F.2d 1013, 1031 (6th Cir. 1975), *cert. denied*, 425 U.S. 973 (1976); *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041, 1049 (5th Cir.), *cert. denied*, 414 U.S. 822 (1973); *Hodgson v. Corning Glass Works*, 474 F.2d 226, 234 (2d Cir. 1973), *aff'd sub nom. Corning Glass Works v. Brennan*, 417 U.S. 188 (1974); *Hodgson v. Miller Brewing Co.*, 457 F.2d 221, 227 (7th Cir. 1972); *Hodgson v. Fairmont Supply Co.*, 454 F.2d 490, 493 (4th Cir. 1972); *Shultz v. American Can Co.-Dixie Prods.*, 424 F.2d 356, 360 (8th Cir. 1970).

Notwithstanding the large number of courts that have adopted the substantially equal standard, two divergent interpretations—perhaps reflecting the inconsistency in the congressional debate on the meaning of equal work, see note 18 *supra*—have emerged. A minority of courts have held that job content, as well as skill, effort, and responsibility must be substantially equal. *Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164, 1175-76 (3d Cir. 1977); *Brennan v. City Stores, Inc.*, 479 F.2d 235, 238-40 & n.11 (5th Cir. 1973); *Hodgson v. Miller Brewing Co.*, 457 F.2d 221, 227 (7th Cir. 1972); *Chapman v. Pacific Tel. & Tel. Co.*, 456 F. Supp. 65, 69 (N.D. Cal. 1978); *Molthan v. Temple Univ.*, 442 F. Supp. 448, 453 (E.D. Pa. 1977); *Calage v. University of Tenn.*, 400 F. Supp. 32, 37 (E.D. Tenn. 1975), *aff'd*, 544 F.2d 297 (6th Cir. 1976). Indeed, the strict examination of actual job tasks mandated by this construction of the EPA narrows the scope of the statute to such an extent that if, upon initial analysis, the job tasks are not determined to be substantially equal, there is no need to even attempt to examine skill, effort, and responsibility. See *Christopher v. Iowa*, 559 F.2d 1135, 1139 n.16 (8th Cir. 1977).

Under the more accepted interpretation, however, which was applied by the Third Circuit in *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, *cert. denied*, 398 U.S. 905 (1970), the factors enumerated in the Act—skill, effort, responsibility, and similar working conditions—were themselves to be compared, and jobs were substantially equal when, after ignoring insubstantial differences, these factors were substantially equal. *Id.* at 265; see, e.g., *Usery v. Columbia Univ.*, 568 F.2d 953, 958-59 (2d Cir. 1977); *Katz v. School Dist.*, 557 F.2d 153, 156 (8th Cir. 1977); *Brennan v. South Davis Community Hosp.*, 538 F.2d 859, 863 (10th Cir. 1976); *Thompson v. Boyle*, 21 Fair Empl. Prac. Cas. 57, 73-74 (D.D.C. 1979); *Cullari v. East-West Gateway Coordinating Council*, 457 F. Supp. 335, 341 (E.D. Mo. 1978); *Brennan v. Board of Educ.*, 374 F. Supp. 817, 828-30 (D.N.J. 1974); *Hodgson v. Daisy Mfg. Co.*, 317

on whether the statutory factors of skill, effort, and responsibility may be aggregated in determining if jobs are substantially equal.²³ If these factors may not be aggregated, there can be no finding that two jobs involve equal work unless they are determined to be substantially equal with respect to each individual factor.²⁴ In contrast, if the factors may be aggregated, an employee need only demonstrate that the skill, effort, and responsibility required to perform his job are collectively equal to that required to perform a job held by a member of the opposite sex.²⁵

The aggregation approach was endorsed in *Hodgson v. Daisy*

F. Supp. 538, 541-42 (W.D. Ark. 1970), *modified per curiam*, 445 F.2d 823 (8th Cir. 1971). Courts taking this approach have stressed that the *content* of the individual jobs in question does not have to be identical if the jobs require equal skill, effort, and responsibility. *See, e.g.,* Usery v. Columbia Univ., 568 F.2d 953, 958 (2d Cir. 1977); Brennan v. South Davis Community Hosp., 538 F.2d 859, 862-63 (10th Cir. 1976). Notably, when there is a common core of tasks in the two jobs in question, the question under this construction of the statute becomes how different the noncommon tasks must be to preclude a finding of equal work. *See Sullivan, The Equal Pay Act of 1963: Making and Breaking a Prima Facie Case*, 31 ARK. L. REV. 545, 573-74 (1978). Among the criteria considered in determining whether two "common core" jobs are substantially equal are how frequently the different tasks are performed, the amount of time necessary to perform each additional task, and whether they have some special significance. *See generally*, 29 C.F.R. § 800.122(a) (1979); Sullivan, *supra*, at 573-74. In addition, courts, beginning with *Wheaton Glass*, have developed the "'least different' and 'most alike' principle." Sullivan, *supra*, at 574-76. The rule has been stated: "Given a substantial, predominant core of work common to two jobs, the inequality of non-common work must be assessed in terms of the tasks done by those in the favored class whose work *least differs* from that done by those in the disfavored class." *Id.* at 574 (emphasis added). *See Shultz v. American Can Co.-Dixie Prods.*, 424 F.2d 356, 360-61 (8th Cir. 1970); *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 262-63 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).

²³ *See* Angelo v. Bacharach Instrument Co., 555 F.2d 1164, 1175-76 (3d Cir. 1977); Kohne v. IMCO Container Co., 480 F. Supp. 1015, 1038-39 (W.D. Va. 1979); Krumbeck v. John Oster Mfg. Co., 313 F. Supp. 257, 260 (E.D. Wis. 1970). *See also* Chrapliwy v. Uniroyal, Inc., 15 Fair Empl. Prac. Cas. 795, 806 (N.D. Ind. 1977).

²⁴ *See* Usery v. Columbia Univ., 568 F.2d 953, 959-60 (2d Cir. 1977); Angelo v. Bacharach Instrument Co., 555 F.2d 1164, 1175-76 (3d Cir. 1977). It has been held, moreover, that the concept of effort entails only physical effort. Usery v. Columbia Univ., 568 F.2d at 960. *But cf.* Wetzel v. Liberty Mut. Ins. Co., 449 F. Supp. 397, 402-03 (W.D. Pa. 1978) (greater caseload of claims representatives could be balanced against the generally higher dollar value of the cases of claims adjusters). Thus, it has been held that a female "light assembler" could not compensate for the difference in physical effort between her job and that of a male "heavy assembler" by showing that her job involved greater mental-visual acuity. Angelo v. Bacharach Instrument Co., 555 F.2d 1164, 1175-76 (3d Cir. 1977).

²⁵ *See* Thompson v. Boyle, 21 Fair Empl. Prac. Cas. 57, 73-74 (D.D.C. 1979); Wetzel v. Liberty Mut. Ins. Co., 449 F. Supp. 397, 402-03 (W.D. Pa. 1978); Brennan v. Houston Endowment, Inc., 7 Empl. Prac. Dec. ¶ 9204, at 7008 (S.D. Tex. 1974), *aff'd*, 511 F.2d 1190 (5th Cir.) (mem.), *cert. denied*, 423 U.S. 893 (1975); Hodgson v. Daisy Mfg. Co., 317 F. Supp. 538, 541 (W.D. Ark. 1970), *modified per curiam*, 445 F.2d 823 (8th Cir. 1971).

Manufacturing Co.,²⁶ where the court compared "heavy" jobs (held entirely by males), requiring substantial physical effort, to "light" jobs (held exclusively by females), requiring substantial skill and responsibility.²⁷ Although acknowledging that male employees were required to expend greater physical effort than were female employees, the court found this difference to be offset by the more demanding mental effort required of the women employees.²⁸ While a strict interpretation of the Act would preclude a comparison of dissimilar jobs,²⁹ the court, apparently engaging in its own evaluation of the job's worth,³⁰ encountered little difficulty in concluding that different jobs could be equally valuable to the employer.³¹

A much more sophisticated job evaluation analysis was utilized in *Thompson v. Boyle*.³² In *Thompson*, female employees of

²⁶ 317 F. Supp. 538 (W.D. Ark. 1970), *modified per curiam*, 445 F.2d 823 (8th Cir. 1971).

²⁷ 317 F. Supp. at 551.

²⁸ *Id.* at 543-44. The court initially observed that a wage differential in favor of males could not be justified merely because males handled more physically demanding duties. *Id.* Absent evidence as to the amount of time such duties consumed and whether all males who received the higher pay devoted approximately the same amount of time to such duties, greater weight may not be accorded to physical effort, the court held, than is accorded to skill, responsibility, and working conditions. *Id.* The court's conclusion was predicated on the testimony of an industrial psychologist who testified that the risk of injury to women in their jobs—placing parts in high-speed presses—necessitated a high degree of mental and physical attention for sustained periods, resulting in mental stress and fatigue. *Id.* at 543. Moreover, the court noted that the Department of Labor defined "effort" in terms of "the physical or mental exertion needed for the performance of a job," 29 C.F.R. § 800.127 (1979) (emphasis added). 317 F. Supp. at 543. Although Department of Labor guidelines do not have the force of law, courts occasionally have relied on them in construing the EPA. *See, e.g.,* *Usery v. Allegheny County Inst. Dist.*, 544 F.2d 148, 153 n.3 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977); *Brennan v. City Stores, Inc.*, 479 F.2d 235, 239-40 (5th Cir. 1973).

²⁹ *See, e.g.,* *Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164, 1173 (3d Cir. 1977) (heavy and light bench assemblers); *Chapman v. Pacific Tel. & Tel. Co.*, 456 F. Supp. 65, 69 (N.D. Cal. 1978) (advertising sales representatives and telephone sales representatives).

³⁰ While job evaluation analysis has occasionally been performed by the courts, *see* *Wetzel v. Liberty Mut. Ins. Co.*, 449 F. Supp. 397 (W.D. Pa. 1978); *Hodgson v. Unity-Frankford Rack Serv., Inc.*, 21 Wage and Hour Cas. 864 (E.D. Pa. 1974), the practice has been common in arbitration for years. *See generally* C. UPDEGRAFF, *ARBITRATION AND LABOR RELATIONS* 308-09 (3d ed. of *ARBITRATION OF LABOR DISPUTES* 1970); R. WIGGINS, *THE ARBITRATION OF INDUSTRIAL ENGINEERING DISPUTES* 91-121 (1970). The success of job evaluation in the arbitration setting appears to indicate that courts are competent to compare unequal jobs with regard to the factors in a job evaluation plan.

³¹ 317 F. Supp. at 551. The court noted, "It would be absurd to contend, apart from the statutory exceptions, that a male stock handler should be paid more than a female chemist or computer operator, simply because the job of the male requires greater physical effort." *Id.*

³² 21 Fair Empl. Prac. Cas. 57 (D.D.C. 1979).

the Government Printing Office, "Journeyman Bindery Workers," sued their employer under the Equal Pay Act alleging that they were paid less than male "Bookbinders" for work involving equal skill, effort, and responsibility.³³ The jobs of males and females were different—each used different machines to perform different functions.³⁴ Nevertheless, after hearing testimony of job evaluation experts, the court accepted the conclusion of the plaintiffs' experts that the jobs were substantially equal in skill, effort, and responsibility.³⁵ Significantly, the plaintiffs' expert on whom the court placed its greatest reliance declined to attempt a task-by-task comparison, stating that he did not consider such a comparison to be "the most significant [indicator] of the comparability of these two occupations."³⁶ Rather, the expert preferred to view the individual tasks as part of a "qualitatively similar continuum" requiring skill, effort, and responsibility at levels interspersed on this scale.³⁷

Although cases such as *Daisy* and *Thompson* are examples of a liberal interpretation of the EPA, most courts continue to con-

³³ *Id.* at 60. The source of the pay differential was the Government Printing Office (GPO) practice of patterning its pay scales on the general divisions between craft and non-craft occupations maintained by private industry; the bookbinder job was a craft job while the journeyman bindery worker job held noncraft status. *Id.* The court noted that the sexual job segregation at the GPO arose because, traditionally, women were not able to obtain craft bookbinder status in the industry either by undertaking a four-year apprenticeship program or by obtaining equivalent experience. *Id.*

³⁴ *Id.* at 61. Whereas major industrial machines were set up and operated by men, the only machines operated by women were sewing machines. *Id.*

³⁵ *Id.* at 74.

³⁶ *Id.* at 76. A task-by-task comparison frequently has been employed to determine whether the jobs of female aides and male orderlies are substantially equal. In these cases, most courts have recognized that the primary duties of both jobs involve patient care. *See, e.g.,* *Brennan v. South Davis Community Hosp.*, 538 F.2d 859, 863 (10th Cir. 1976); *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719, 725 (5th Cir. 1970). Nonetheless, these courts have upheld wage differentials between aides and orderlies based on differences in effort exerted, *see, e.g.,* *Shultz v. Royal Glades, Inc.*, 66 Lab. Cas. (CCH) ¶ 32,548, at 44,936 (S.D. Fla. 1971); *Hodgson v. Good Shepherd Hosp.*, 327 F. Supp. 143, 147-48 (E.D. Tex. 1971), differences in responsibilities, *see, e.g.,* *Shultz v. Kentucky Baptist Hosp.*, 62 Lab. Cas. (CCH) ¶ 32,296, at 44,121 (W.D. Ky. 1969), or differences in secondary or tertiary tasks, *see, e.g.,* *Hodgson v. Good Shepherd Hosp.*, 327 F. Supp. 143, 147 (E.D. Tex. 1971); *Hodgson v. William & Mary Nursing Hotel*, 20 Wage and Hour Cas. 10, 22 (M.D. Fla. 1971). Differences in secondary and tertiary tasks will not justify a wage differential, however, if aides and orderlies are practical substitutes for one another in the performance of their duties, *Brennan v. Prince William Hosp. Corp.*, 503 F.2d 282, 287 (4th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975), or if they perform their duties as a unit, *Hodgson v. George W. Hubbard Hosp., Inc.*, 351 F. Supp. 1295, 1297-98 (M.D. Tenn. 1971).

³⁷ 21 Fair Empl. Prac. Cas. at 63.

strue the Act strictly.³⁸ Such construction, of course, tends to insulate from review discriminatory compensation practices, such as underpayment and intentional reduction in wages on the basis of sex.³⁹ Moreover, a strict adherence to the equal work standard precludes a job comparison based on other criteria, such as worth to the employer.⁴⁰ Thus, employees seeking relief from sex-based wage discrimination have begun to rely on the broader language of Title VII.

TITLE VII

Title VII of the Civil Rights Act of 1964 was intended to provide a remedy for discrimination in employment on the ground of race, religion, and national origin.⁴¹ Although the original text of the bill did not prohibit sexual discrimination,⁴² the final draft contained a provision rendering such discrimination unlawful.⁴³ In addition, the final version of the statute contained an amendment, known as the Bennett Amendment, which provides that a pay dif-

³⁸ See note 4 *supra*.

³⁹ See, e.g., *Gunther v. County of Wash.*, 623 F.2d 1303, 1312-13 & n.9 (9th Cir. 1979), cert. granted, 49 U.S.L.W. 3322 (U.S. Nov. 4, 1980) (No. 80-429); *IUE v. Westinghouse Elec. Corp.*, 19 Fair Empl. Prac. Cas. 450, 452, 457 (D.N.J. 1979), rev'd, 23 Fair Empl. Prac. Cas. 588 (3d Cir. 1980).

It has been claimed that job segregation by sex results in disparities between female-dominated and male-dominated jobs. See C. LLOYD, *SEX, DISCRIMINATION AND THE DIVISION OF LABOR* 16 (1975); Gitt & Gelb, *Beyond the Equal Pay Act: Expanding Wage Differential Protections Under Title VII*, 8 LOY. CHI. L.J. 723, 729-32 (1977). The argument is that the pay of "female" jobs is depressed because of the association of such jobs with "women's work." See Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of The Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 398, 416-17 (1979); Josephine, *Comparable Pay for Comparable Work*, 1977-1978 American Library Ass'n Council Document 1 (1978).

A fascinating account of systematic undervaluation of a female-dominated job is presented in Gitt & Gelb, *supra* at 729. In 1972, the Equal Employment Opportunity Commission challenged a rate hike proposed by The American Telephone and Telegraph Company before the Federal Communications Commission. At the time of the hearing, AT&T was highly segregated by sex. *Id.* The job of "frameman" was designated as a male job. *Id.* Prior to 1965, only one company, Michigan Bell, employed women in frame work. *Id.* At Michigan, frame work was considered a clerical job, while all other companies regarded it as a craft position. *Id.* When the other companies realized that they could no longer exclude females from the frameman position, they converted the job to a female position. *Id.* A lower rate of pay relative to other craft positions accompanied the conversion. *Id.*

⁴⁰ See *Hodgson v. Miller Brewing Co.*, 457 F.2d 221, 227 (7th Cir. 1972).

⁴¹ See H.R. REP. NO. 914, 88th Cong., 1st Sess. (1963), reprinted in UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *LEGISLATIVE HISTORY OF TITLE VII AND XI OF CIVIL RIGHTS ACT OF 1964* at 2009 (1968).

⁴² See 110 CONG. REC. 2577-78 (1964).

⁴³ 42 U.S.C. § 2000e-2(a) (1976).

ferential based on sex shall not be unlawful under Title VII if the differential is authorized by the provisions of the EPA.⁴⁴ The brief legislative history of the amendment indicates that it was intended to harmonize the two statutes but does not clarify the manner in which this was to be accomplished.⁴⁵

The judicial controversy regarding the proper interpretation of the Bennett Amendment began in *Schultz v. Wheaton Glass Co.*,⁴⁶

⁴⁴ *Id.* § 2000e-2(h); see note 9 *supra*.

⁴⁵ See 110 CONG. REC. 13647 (1964). Senator Bennett recognized the overlap between Title VII and the EPA in the area of sexual discrimination in compensation. See *id.* Describing the amendment as a "technical correction of the bill," *id.*, his stated purpose in introducing it was to ensure that in the event of conflict between the two statutes, the provisions of the Act would not be nullified. *Id.*

A year after the passage of the Bennett Amendment, Senator Bennett read a brief into the Congressional Record for the purpose of clarifying his intent in introducing the amendment. See 111 CONG. REC. 13359 (1965). In pertinent part, it provided:

RELATION OF TITLE VII TO THE EQUAL PAY ACT: AN EXPLANATION OF THE BENNETT AMENDMENT

.....

The amendment speaks in terms of a "differentiation . . . authorized by the provisions of section 6(d) of the Fair Labor Standards Act [the EPA]."

Section 6(d) authorizes two things:

1. Wage differentials as between exempt male and female employees doing the same work; and
2. Wage differentials on equal jobs made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

The amendment therefore means that it is not an unlawful employment practice; (a) to differentiate on the basis of sex in determining the compensation of white collar and other employees who are exempt under the provisions of the Fair Labor Standards Act; or (b) to have different standards of compensation for non-exempt employees, where such differentiation is not prohibited by the equal pay amendment to the Fair Labor Standards Act.

Simply stated, the amendment means that discrimination in compensation on account of sex does not violate title VII unless it also violates the Equal Pay Act.

Id.

While Senator Bennett may have intended his brief as a clarification of the meaning of the Bennett Amendment, the brief is, if possible, more ambiguous than the amendment itself. Senator Bennett's explanation of wage differentials that are authorized by section 6(d) (paragraphs "1" and "2") is contradicted by his statement in the last paragraph that discrimination in compensation does not violate Title VII unless it also violates the Equal Pay Act. *Id.*

After Senator Bennett's brief was read into the Congressional Record, Senator Dirksen expressed surprise that the language of the Bennett Amendment had been questioned. *Id.* at 13360. He stated that he and his staff had carefully examined the amendment before it was offered, and that he believed the language of the amendment spoke for itself. *Id.* In so stating, he reiterated his belief, expressed at the time the amendment was introduced and unchallenged by Senator Bennett, see 110 CONG. REC. 13647 (1964), that the amendment merely recognizes the exceptions to the EPA. 111 CONG. REC. at 13360.

⁴⁶ 421 F.2d 259 (3d Cir.), cert. denied, 398 U.S. 905 (1970).

where the court stated, in dicta, that the amendment mandated that the EPA and Title VII be construed consistently in the area in which they overlap.⁴⁷ Although the court noted that the two statutes were in *pari materia*, it did not attempt to state the precise manner in which they should be harmonized.⁴⁸ The *Wheaton Glass* court expressed concern, however, that the amendment not be construed in a manner which would undermine Title VII.⁴⁹ Nevertheless, until recently, this concern went unheeded as courts construing the relationship between Title VII and the Act focused more on the dicta in *Wheaton Glass*.⁵⁰ Consequently, the scope of Title VII was effectively limited as courts held that the Bennett Amendment incorporated the equal work standard of the EPA into Title VII.⁵¹

Recently, in an effort to determine more definitively the relationship between Title VII and the EPA, courts have placed greater emphasis on the legislative history of the Bennett Amendment. In *IUE v. Westinghouse Electric Corp.*,⁵² female electrical production workers alleged that Westinghouse maintained a dual wage structure,⁵³ paying women less than men for jobs the employer evaluated as being equal in worth.⁵⁴ The women claimed that certain female jobs corresponded to certain male jobs and that Westinghouse evaluated them at equal point levels for skill, effort,

⁴⁷ *Id.* at 266.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See, e.g., *Orr v. Frank R. MacNeill & Son, Inc.*, 511 F.2d 166, 171 (5th Cir.), *cert. denied*, 423 U.S. 865 (1975); *Ammons v. Zia Co.*, 448 F.2d 117, 120 (10th Cir. 1971). See also *Wetzel v. Liberty Mut. Ins. Co.*, 449 F. Supp. 397, 400-01 (W.D. Pa. 1978); *Lemons v. Denver*, 17 Fair Empl. Prac. Cas. 906, 911-12 (D. Colo. 1978), *aff'd*, 620 F.2d 228 (10th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3228 (U.S. Oct. 6, 1980) (No. 80-82).

⁵¹ *Di Salvo v. Chamber of Commerce*, 568 F.2d 593, 596 (8th Cir. 1978); *Calage v. University of Tenn.*, 544 F.2d 297, 302 (6th Cir. 1976); *Orr v. Frank R. MacNeill & Son, Inc.*, 511 F.2d 166, 170-71 (5th Cir.), *cert. denied*, 423 U.S. 865 (1975); *Ammons v. Zia Co.*, 448 F.2d 117, 119-20 (10th Cir. 1971); *Kohne v. IMCO Container Co.*, 480 F. Supp. 1015, 1038-39 (W.D. Va. 1979); *IUE v. Westinghouse Elec. Corp.*, 19 Fair Empl. Prac. Cas. 450, 456-57 (D.N.J. 1979), *rev'd*, 23 Fair Empl. Prac. Cas. 588 (3d Cir. 1980); *Rinkel v. Associated Pipeline Contractors*, 17 Fair Empl. Prac. Cas. 225, 226 (D. Alaska 1978); *Lemons v. Denver*, 17 Fair Empl. Prac. Cas. 906, 912 (D. Colo. 1978), *aff'd*, 620 F.2d 228 (10th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3228 (U.S. Oct. 6, 1980) (No. 80-82); *Wetzel v. Liberty Mut. Ins. Co.*, 449 F. Supp. 397, 400-01 (W.D. Pa. 1978); *Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252, 266 (W.D. Mo. 1977); *Molthan v. Temple Univ.*, 442 F. Supp. 448, 454 (E.D. Pa. 1977).

⁵² 19 Fair Empl. Prac. Cas. 450 (D.N.J. 1979), *rev'd*, 23 Fair Empl. Prac. Cas. 588 (3d Cir. 1980).

⁵³ 19 Fair Empl. Prac. Cas. at 451-52.

⁵⁴ *Id.* at 452.

and responsibility. Although the plaintiffs acknowledged that the jobs were not equal,⁵⁵ they claimed that the dual wage structure constituted a violation of Title VII, since the employer itself recognized the equal worth of the jobs.⁵⁶ The district court examined the legislative history of the Bennett Amendment and concluded that although not dispositive,⁵⁷ it tended to support the defendant's contention that the equal work standard must be met for a valid cause of action to exist under Title VII.⁵⁸ The court therefore dismissed the complaint, holding that since the plaintiffs admitted that the jobs were not equal, they had not stated a claim for which relief could be granted under Title VII.⁵⁹

On appeal, the Third Circuit reversed,⁶⁰ reasoning, after a thorough examination of the legislative history, EEOC regulations, and caselaw, that a contrary decision would extend less protection under Title VII to victims of wage discrimination on the basis of sex than is afforded to victims of such discrimination on the basis of race, religion, or national origin.⁶¹ Observing that the legislative materials on the Bennett Amendment were "remarkable only for their equivocacy and turbidity,"⁶² the court interpreted a colloquy between Senator Bennett and Senator Dirksen as signifying that the amendment was intended to carry forward only the exceptions

⁵⁵ *Id.*

⁵⁶ *Id.* at 451-52. In their complaint, the plaintiffs alleged that their claim arose out of an official company policy promulgated by Westinghouse in 1938. *Id.* at 451. Westinghouse's Industrial Relations Manual, dated February 1, 1939, stated:

The gradient of the women's wage curve . . . is not the same for women as for men because of the more transient character of the service of the former, the relative shortness of their activity in industry, the differences in environment required, the extra services that must be provided, overtime limitations, extra help needed for the occasional heavy work, and the general sociological factors not requiring discussion herein.

Brief for Appellants at 7, *IUE v. Westinghouse Elec. Corp.*, 23 Fair Empl. Prac. Cas. 588 (3d Cir. 1980).

⁵⁷ 19 Fair Empl. Prac. Cas. at 454. The court acknowledged that "Congress did not give fullest possible attention to the extent to which the sex discrimination provisions of Title VII were to be coterminous with those prohibitions against discrimination based on factors other than sex." *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 457. The court stated that its ruling was based on the conclusion that "allegations and proof of unequal pay for unequal, but comparable work does not state a claim upon which relief can be granted under Title VII . . ." *Id.*

⁶⁰ *IUE v. Westinghouse Elec. Corp.*, 23 Fair Empl. Prac. Cas. 588 (3d Cir. 1980).

⁶¹ *Id.* at 590, 592.

⁶² *Id.* at 594.

to the EPA and not the substantially equal standard as well.⁶³ As further support for its conclusion, the court noted that EEOC regulations⁶⁴ construing the relationship between Title VII and the Act provide that the scope of Title VII is "coextensive with, but not limited by," the proscriptions of the Fair Labor Standards Act of which the EPA is a part.⁶⁵ Finally, examining the relevant caselaw, the Third Circuit summarily rejected decisions holding that Title VII incorporated the substantially equal standard of the EPA. In those cases, the court stated, the "issue has generally not been directly confronted for adjudication on a record similar to the present one."⁶⁶ Rather, the court found persuasive the decision of the Ninth Circuit in *Gunther v. County of Washington*,⁶⁷ which was rendered subsequent to the lower court decision in *IUE*.⁶⁸

In *Gunther*, female prison guards had brought suit against their municipal employer, alleging, *inter alia*, that a portion of the discrepancy between their salaries and those of the male guards could be attributed only to sex discrimination.⁶⁹ Noting that no appellate court had addressed the question of whether Title VII was broad enough to encompass discriminatory compensation claims not predicated on a theory of equal pay for equal work,⁷⁰ the Ninth Circuit examined the legislative history of the Bennett Amendment in order to determine whether the amendment did indeed incorporate the equal work standard into Title VII. Stating that "[t]he relevant legislative history, though sparse, is enlightening," the court concluded that Title VII was not limited by the

⁶³ *Id.* at 595. The court rejected Senator Bennett's postadoption attempt to clarify the meaning of the amendment, *see* note 45 *supra*, on the ground that the senators who had approved the amendment had not relied on it, but rather relied on Senator Bennett's earlier explanation. *Id.*

⁶⁴ 29 C.F.R. § 1604.8 (1979).

⁶⁵ 23 Fair Empl. Prac. Cas. at 597 & n.16. The defendant argued that the present regulations were entitled to little weight, because previous regulations, promulgated in 1965, provided that the equal work standard was to be used in Title VII cases. *Id.* at 597. Noting that the previous regulations also provided that coverage under Title VII was coextensive with, but not limited to coverage under the Fair Labor Standards Act, *see* 30 Fed. Reg. 14,928 (1965), the *IUE* court rejected the defendant's argument, interpreting the 1965 regulations to mean that the equal work standard was applicable in situations where both statutes are applicable. 23 Fair Empl. Prac. Cas. at 597.

⁶⁶ *Id.* at 598.

⁶⁷ 623 F.2d 1303 (9th Cir. 1979), *cert. granted*, 49 U.S.L.W. 3322 (U.S. Nov. 4, 1980) (No. 80-429).

⁶⁸ 23 Fair Empl. Prac. Cas. at 598 n.19.

⁶⁹ 623 F.2d at 1308.

⁷⁰ *Id.* at 1310-11.

strictures of the equal work standard.⁷¹ To hold otherwise, the court stated, would frustrate the remedial purpose of Title VII by insulating from review discriminatory practices which were as harmful as those expressly outlawed.⁷² Although the court recognized that problems of proof might present substantial barriers, it nevertheless ruled that the plaintiffs should be afforded the opportunity to establish a claim of discrimination.⁷³

⁷¹ *Id.* at 1311-12. The *Gunther* court found that the legislative history of the Bennett Amendment, though scant, supported the plaintiffs' contention that Title VII incorporated the affirmative defenses of the EPA, but not its equal work standard. *Id.* In so holding, the *Gunther* court relied on a previous interpretation of the Bennett Amendment by the Ninth Circuit to the same effect, *Manhart v. Los Angeles Dep't of Water & Power*, 553 F.2d 581 (9th Cir. 1976), *aff'd in part, rev'd in part*, 435 U.S. 702 (1978). 623 F.2d at 1312. In *Manhart*, the plaintiffs challenged a retirement plan that required greater contributions by women. 553 F.2d at 583. The Ninth Circuit held that such a plan was unaffected by any of the EPA affirmative defenses and that the Bennett Amendment merely incorporated those defenses into Title VII. *Id.* at 590. The *Gunther* court also relied on the statement in *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 446 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978), that a "sex predicated wage differential is immune from attack under Title VII only if it comes within one of the four enumerated exceptions to the Equal Pay Act." 623 F.2d at 1312. The *Laffey* holding is not as significant as it appears to be, however, because in that case, the court found the work of the male and female employees to be substantially equal. 567 F.2d at 451. See also Gitt & Gelb, *supra* note 39, at 749-50.

⁷² 623 F.2d at 1313 n.9. The court posited the situation which existed in *Rinkel v. Associated Pipeline Contractors*, 17 Fair Empl. Prac. Cas. 224 (D. Alaska 1978), wherein the plaintiff offered to prove that her employer had told her that he would pay her a higher salary if she were a man. Although the *Rinkel* court denied the plaintiff's claim under the EPA because she occupied a unique position, and the Act contemplated a comparison between two positions, *id.* at 226, the *Gunther* court found no indication "that the Bennett Amendment was intended to legalize such practices under Title VII," 623 F.2d at 1313 n.9. See note 93 and accompanying text *infra*.

⁷³ 623 F.2d at 1314. Subsequent to *Gunther*, the Tenth Circuit, without referring to *Gunther*, also held that the Bennett Amendment does not incorporate the equal work standard of the Equal Pay Act into Title VII. In *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945 (10th Cir. 1980), the plaintiff, a female employee, sued her employer under Title VII alleging discrimination in compensation and denial of opportunities for advancement on the ground of sex. *Id.* at 948. Specifically, plaintiff claimed that she performed most of the duties of the Director of the Advertising Department, but received neither the title of Advertising Director nor pay commensurate with her work. *Id.* at 949. The district court agreed that plaintiff had been undercompensated, *id.* at 949-50, and stated that the EPA had been violated in connection therewith, *id.* at 952, notwithstanding that no such violation had been alleged.

The defendant appealed, contending, *inter alia*, that the court had erred in finding sexual discrimination in compensation because the plaintiff did not perform *all* the duties of the Advertising Director. *Id.* at 953. In holding that the Bennett Amendment incorporated only the affirmative defenses of the EPA into Title VII, the Tenth Circuit distinguished the cases the defendant had relied on, stating that they did not address the question of whether discrimination which does not violate the EPA could violate Title VII. *Id.* at 953-54 & n.2. Noting that the case was "not a case in which a discriminatory activity is specifically sanctioned under the [EPA] exceptions and liability is, nonetheless, sought under Title VII,"

It is submitted that the *Gunther* and *IUE* courts correctly interpreted the Bennett Amendment. Since the legislative history of the amendment is ambiguous,⁷⁴ it appears that the better approach is to construe the provision, as did the Third and Ninth Circuits, consistently with the broad remedial purpose of the entire statute, rather than to attempt to clarify the questionable section in isolation.⁷⁵ As the Third Circuit pointed out, adherence to the contrary approach, wherein Title VII has been held to incorporate the equal work standard, would afford less protection to plaintiffs who claim sexual discrimination in compensation than is accorded to a plaintiff in a claim for wage discrimination based on race.⁷⁶ Since the

the court held that a finding of discrimination under the latter statute did not violate the former. *Id.* at 953 n.2 (emphasis added).

By its holding in *Fitzgerald*, the Tenth Circuit appears to have overruled, *sub silentio*, its earlier decision in *Ammons v. Zia Co.*, 448 F.2d 117 (10th Cir. 1971), where it held that to establish a *prima facie* case of sexual discrimination in compensation under Title VII, the plaintiff must demonstrate that she has performed equal work. *Id.* at 120.

⁷⁴ See note 45 and accompanying text *supra*. It is interesting to note that legal writers who attempted to define the relationship between Title VII and the EPA shortly after the passage of the Civil Rights Act did not believe that the Bennett Amendment incorporated the EPA standard into Title VII claims for sexual discrimination in compensation. See Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62, 75-76 (1964); Tolan, *Discrimination: Sex and Age Questions*, 21 N.Y.U. CONF. ON LAB. 59, 61-62 (1968). In fact, there appeared to be a question as to whether the Bennett Amendment even incorporated the affirmative defenses of the Act. Rather, the commentators felt that the word "authorized" in the amendment, see note 9 *supra*, pertained to the coverage of the Fair Labor Standards Act. See Berg, *supra*, at 75-76; Tolan, *supra*, at 61-62. Moreover, the EEOC guidelines promulgated in 1967 stated that while Title VII's ban on sex discrimination in compensation overlaps with the EPA, Title VII is not limited to the EPA's express coverage. 29 C.F.R. § 1604.7 (1967) (superceded by 29 C.F.R. § 1604.8 (1979)). The present guidelines make the same reference, but state further: "By virtue of section 703(h) [The Bennett Amendment], a defense based on the Equal Pay Act may be raised in a proceeding under Title VII." 29 C.F.R. § 1604.8(b) (1979) (emphasis added). Thus, while there was general disagreement as to the relationship between Title VII and the EPA at the time of the Bennett Amendment's enactment, there was little support for the proposition that the amendment applied the equal work standard to Title VII cases. But see Note, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671, 718.

⁷⁵ An expansive interpretation of the Bennett Amendment is consistent with the tenet of statutory construction that civil rights legislation should be broadly construed in order to effectuate its remedial purposes. 3 A. SUTHERLAND, STATUTORY CONSTRUCTION § 72.05, at 392 (4th ed. C. Sands 1974). Further, applying the rule of construction that the words of a statute have their ordinary meaning in the absence of persuasive reasons to the contrary, *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975), it is suggested that the language of the Bennett Amendment tends to support the proposition that only the affirmative defenses of the EPA are incorporated into Title VII, rather than the equal work standard, since the word "authorize" implies an affirmative sanction, rather than a mere absence of prohibition.

⁷⁶ *IUE v. Westinghouse Elec. Corp.*, 23 Fair Empl. Prac. Cas. 588, 592-93 (3d Cir. 1980).

equal work standard of the EPA does not apply to race claims, the restrictive interpretation of the Bennett Amendment would not be extended to these claims under Title VII.⁷⁷ In approving the sex amendment to the statute, however, Congress did not intend to treat women differently from blacks. Rather, the amendment was favored because it would ensure that employers would not be able to discriminate against white females with impunity.⁷⁸

In light of the decisions in *Gunther* and *IUE*, the question arises as to whether the broadened interpretation of Title VII effectively nullifies the EPA. Unlike the EPA, Title VII is, no doubt, broad enough to provide a remedy for the whole spectrum of discriminatory compensation practices,⁷⁹ as well as for claims of discrimination in hiring or promotion.⁸⁰ Hence, because of its broader jurisdictional base, it appears likely that Title VII will be the statute under which most, if not all, future claims for discrimination in compensation will be brought.⁸¹ Nevertheless, it would be inaccurate to suggest that the EPA is rendered entirely superfluous by the enactment of and liberal construction recently given to Title VII. Notably, the provisions differ significantly with respect to the time within which some action must be taken to preserve a claim and the availability of a jury trial. Under Title VII, a plaintiff may lose his cause of action if charges are not filed with the Equal Employment Opportunity Commission within 180 days of the alleged discrimination.⁸² The EPA, on the other hand, provides for a two-

⁷⁷ See *Lowe v. WCAU-T.V.*, 21 Fair Empl. Prac. Cas. 594, 597 (E.D. Pa. 1979); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968). In *Quarles*, the black plaintiffs alleged that the employer deliberately paid them lower wages than white employees. 279 F. Supp. at 507. In the course of concluding that the job of casing attendant, a position reserved for blacks, was underpaid relative to the comparable job of basic machine operator, which was reserved for white employees, the court found that the rate of pay of the casing attendant had not been "determined through work analysis and evaluation of all jobs throughout the plant, but solely through comparison of his job with jobs held only by negroes." *Id.* The court held that such an employment practice was intentional, unlawful discrimination. *Id.* at 510.

⁷⁸ See 110 CONG. REC. 2579-80 (1964) (colloquy between Reps. Griffiths and Cellar).

⁷⁹ See 42 U.S.C. § 2000e-2(a)(1) (1976).

⁸⁰ See, e.g., *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945 (10th Cir. 1980).

⁸¹ The proscriptions against discrimination in Title VII are applicable to industries "affecting commerce," 42 U.S.C. § 2000e (1976), a much broader standard than "engaged in commerce," which is found in the EPA, 29 U.S.C. § 203 (1976). Additionally, the Act exempts numerous groups from coverage, see 29 U.S.C. § 213 (1976), including domestic servants, *id.* § 213(a)(15), and retail establishments not meeting certain dollar volume requirements, *id.* § 213(a)(2), that are covered by Title VII.

⁸² 42 U.S.C. § 2000e-5(e) & (f) (1976).

year statute of limitations.⁸³ In addition, a jury trial is available under the EPA with respect to certain claims,⁸⁴ in contrast to Title VII which makes no provision for trial by jury.⁸⁵ Although, at first blush, such differences appear to militate in favor of retaining a cause of action under the EPA, it must be noted that the difficulty of proving that jobs are substantially equal under the EPA⁸⁶ would allow relatively few plaintiffs to benefit from these advantages.

In light of the judicial trend to construe Title VII as not incorporating the equal work standard of the EPA, it appears that courts will be considering Title VII claims based on such theories as comparable worth and comparable work. There is, therefore, a need to delineate the boundaries of a *prima facie* case of wage discrimination based on Title VII.

THEORY AND PROOF

Courts construing Title VII have developed several theories on which a claim of discrimination may be predicated. Depending on the facts, a plaintiff may define his case in terms of disparate treatment, adverse impact, present effects of past discrimination, and reasonable accommodation.⁸⁷ Generally, however, wage discrimination claims seem to be most amenable to analysis under the disparate treatment⁸⁸ and adverse impact theories.⁸⁹

Disparate Treatment

Under the disparate treatment theory, a plaintiff must show that the employer allowed himself to be consciously influenced by sex in deciding the rate of pay.⁹⁰ Central to establishing a *prima*

⁸³ 29 U.S.C. § 255 (1976).

⁸⁴ Since the EPA is to be enforced in accordance with the Fair Labor Standards Act, *Carter v. Marshall*, 16 Empl. Prac. Dec. 5269 (D.C. Cir. 1978), the rule that a claim under the Fair Labor Standards Act is entitled to a jury trial applies to the EPA, *Wirtz v. Jones*, 340 F.2d 901, 904 (5th Cir. 1965).

⁸⁵ 42 U.S.C. § 2000e-5(f)(4) (1976). See *Slack v. Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975); *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 308 (6th Cir. 1975), *vacated and remanded on other grounds*, 431 U.S. 951 (1977); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969).

⁸⁶ See, e.g., *Usery v. Columbia Univ.*, 568 F.2d 953, 959-60 (2d Cir. 1977); *Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164, 1175-76 (3d Cir. 1977).

⁸⁷ B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1 (1976 & Supp. 1979).

⁸⁸ See notes 90-116 and accompanying text *infra*.

⁸⁹ See notes 124-40 and accompanying text *infra*.

⁹⁰ See EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *INTERPRETIVE MANUAL* 37-38 (1972)[hereinafter cited as *EEOC INTERPRETIVE MANUAL*].

facie case under this theory, therefore, is proof of discriminatory intent.⁹¹ While under the EPA a tacit presumption of intent to discriminate arises once the test of substantial equality is met,⁹² Title VII provides no standards which, if violated, would give rise to a presumption of intent. A plaintiff must, therefore, produce either direct or circumstantial evidence of intent in order to make out a prima facie case of disparate treatment under the statute.

Direct evidence, such as admissions by the employer, would be particularly useful to an employee seeking to establish that sex was a factor in determining the rate of pay;⁹³ such proof of intent, however, is rarely available. Therefore, plaintiffs generally have been allowed to prove intent to discriminate through the use of comparative evidence—a form of circumstantial evidence.⁹⁴ In a treatment case, comparative evidence is employed to determine whether different employees are similarly situated.⁹⁵ Since antidiscrimination statutes require that similarly situated people be treated similarly,⁹⁶ it is reasonable to infer that any disparate treatment of similarly situated persons was motivated by discriminatory intent,⁹⁷ unless an adequate nondiscriminatory explanation is offered

⁹¹ *Id.*

⁹² See *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974); *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 266 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).

⁹³ See *Gates v. Georgia-Pacific Corp.*, 326 F. Supp. 397, 397-99 (D. Or. 1970), *aff'd*, 492 F.2d 292 (9th Cir. 1974); EEOC INTERPRETIVE MANUAL, *supra* note 90, at 47. *Rinkel v. Associated Pipeline Contractors*, 17 Fair Empl. Prac. Cas. 224 (D. Alaska 1978), illustrates a situation where an employer's admission exposed his discriminatory motive. In *Rinkel*, the plaintiff sued under the EPA claiming that her employer underpaid her because she was a woman. *Id.* at 224-25. She introduced evidence that her employer admitted he would have paid her a higher salary if she were a man. *Id.* at 226. The court granted summary judgment for the defendant, holding that the Act necessarily contemplated a comparison between two jobs and since plaintiff's position was "unique," the Act could not apply. *Id.* The court indicated, however, that such treatment could violate other laws. *Id.* See note 72 *supra*.

⁹⁴ See, e.g., *Marquez v. Ford Motor Co.*, 440 F.2d 1157, 1162 (8th Cir. 1971); *Gates v. Georgia-Pacific Corp.*, 326 F. Supp. 397 (D. Or. 1970), *aff'd*, 492 F.2d 292 (9th Cir. 1974).

⁹⁵ See EEOC INTERPRETIVE MANUAL, *supra* note 90, at 48-49. Comparative evidence, of course, must relate to a sufficiently large number of similarly situated persons to provide a meaningful basis for drawing an inference. *Id.* Hence, if the comparison is on a one-to-one basis, the inference is weak. *Id.*

⁹⁶ See *id.*

⁹⁷ B. SCHLEI & P. GROSSMAN, *supra* note 87, at 16. *Roesel v. Joliet Wrought Washer Co.*, 596 F.2d 183 (7th Cir. 1979), presents a striking illustration of the use of comparative evidence to present a prima facie case of disparate treatment. In *Roesel*, the plaintiff, a Personnel Director, was one of only two women in management at the defendant company; the two women were the lowest paid members of management. *Id.* at 185. Addressing the plaintiff's allegation that she had been the victim of sex-based wage discrimination, the court initially determined that the jobs performed by the women were substantially equal. *Id.* at 186. Ob-

for the different treatment.⁹⁸

An attempt to raise an inference of discriminatory intent by contrasting jobs would constitute the typical application of comparative evidence. Since, under a liberal construction of the Bennett Amendment, Title VII permits actions requiring the comparison of unequal jobs, a criterion other than equal work is necessary in order to determine whether a pay differential is the result of discriminatory intent. One possible criterion is "comparable worth" which presumes that jobs of equal worth to the employer should receive the same pay.⁹⁹ "Proportionate equality," also known as comparable pay for comparable work, is another possible criterion.¹⁰⁰ Indeed, this latter criterion was employed by the *Gunther* plaintiffs who, in alleging that a portion of the pay discrepancy could be attributable only to sexual discrimination,¹⁰¹ were really claiming that a pay disparity based on legitimate job differ-

serving that the company had given a raise to the other woman after a government agent reviewing the company's affirmative action program suggested that her salary was out of line in comparison to that of a male Production Control Supervisor, *id.* at 185, the court inferred that the company would have paid a male performing the same work as the plaintiff a higher salary and thus found the discriminatory intent requisite to a Title VII violation, *id.* at 186.

⁹⁸ While the burden of proving disparate treatment falls upon the plaintiff, the defendant has the burden of establishing a nondiscriminatory reason for the disparity. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). In meeting this burden, however, it is not necessary for the defendant to prove the absence of a discriminatory motive. *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 24-25 (1978) (per curiam).

⁹⁹ See Lewin, *The 'Pink Collar' Revolution*, Nat'l L.J., Dec. 10, 1979, at 1, col. 1; Bennetts, *The Equal Pay Issue: Focusing on Comparable Worth*, N.Y. Times, Oct. 26, 1979, at 20, col. 1; Curran, *Eleanor Holmes Norton Attacks Job Bias*, WORKING WOMAN, Mar. 1980, at 43; Moore, *Equal Pay for Work of Equal Value?*, ENTERPRISE, Aug. 1979, at 13; Galloway & Archuleta, *Sex and Salary: Equal Pay for Comparable Work*, AMERICAN LIBRARIES, May 1978, at 281. Comparable worth was conceived to address the more pervasive discrimination, lying beyond the proscriptive ambit of the EPA, that affects women who perform work which, although different from that traditionally performed by men, is of equal value. See *Hearings Before The Subcomm. on Employment Opportunities of the House Comm. on Educ. and Lab.*, 95th Cong., 2d Sess. 288 (1978-1979)(statement of Alexis Herman, Director, Women's Bureau, U.S. Dep't of Lab.) [hereinafter cited as *Hearings*].

Several labor organizations have spoken out in favor of the comparable worth theory, which has been called the "most significant unresolved issue on the Title VII horizon." See *Hearings*, *supra*, at 394. In fact, within the past several years, a few unions have been able to negotiate comparable worth clauses in their collective bargaining contracts. See U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1425 MAJOR COLLECTIVE BARGAINING AGREEMENTS: WAGE ADMINISTRATION PROVISIONS 17 (1978).

¹⁰⁰ See *Gunther v. County of Wash.*, 623 F.2d 1303, 1309-14 (9th Cir. 1979), *cert. granted*, 49 U.S.L.W. 3322 (U.S. Nov. 4, 1980) (No. 80-429). See generally Greenfield, *From Equal to Equivalent Pay: Salary Discrimination in Academia*, 6 J. LAW & EDUC. 41 (1977).

¹⁰¹ 623 F.2d at 1309-14.

ences should be in proportion to those differences.

The use of worth as a standard of comparison through which discriminatory intent is inferred necessarily presupposes that relative worth is capable of objective measurement. Job evaluation was conceived to fulfill this purpose.¹⁰² A basic tenet of job evaluation theory is that the best determinant of value is the job itself, not the person occupying it.¹⁰³ The theory also assumes that, in determining the value of jobs, there are constants which exist in every position regardless of individual differences. The most common constants are skill, effort, responsibility, and working conditions,¹⁰⁴ the very factors written into the EPA.¹⁰⁵

Three stages are involved in the job evaluation process: job analysis, job ranking, and setting wage and salary rates.¹⁰⁶ Job

¹⁰² J. PATTON, C. LITTLEFIELD, & S. SELF, *JOB EVALUATION, TEXT AND CASES* 4 (3d ed. 1964) [hereinafter cited as PATTON, LITTLEFIELD & SELF]. Job evaluation, however, has only rarely been used to determine whether work is equal. See *Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164 (3d Cir. 1977); *Thompson v. Boyle*, 21 Fair Emp. Prac. Cas. 57 (D.D.C. 1979); *Wetzel v. Liberty Mut. Ins. Co.*, 449 F. Supp. 397 (W.D. Pa. 1978).

There are several frequently utilized methods of job evaluation, including ranking, classification, factor comparison, and the point method system. See generally NATIONAL RESEARCH COUNCIL/NATIONAL ACADEMY OF SCIENCES, *JOB EVALUATION: AN ANALYTIC REVIEW* (1979) (Interim Report to the Equal Employment Opportunity Commission) [hereinafter cited as NAS REPORT]. The NAS REPORT, a study on the feasibility of utilizing job evaluation to determine the value of jobs, was commissioned by the Equal Employment Opportunity Commission, see *id.* at xi, which, on July 1, 1979, assumed jurisdiction over the EPA, EEOC Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (1978). Although the NAS REPORT is only an interim report, the ultimate aim of the National Academy of Sciences is to assess the feasibility of utilizing job evaluation techniques in wage discrimination cases under Title VII. NAS REPORT, *supra*, at xii. It is hoped that after the NAS finally concludes its study, the EEOC will promulgate guidelines relating to wage discrimination which will harmonize the EPA and Title VII.

¹⁰³ NAS REPORT, *supra* note 102, at 1; PATTON, LITTLEFIELD & SELF, *supra* note 102, at 4.

¹⁰⁴ NAS REPORT, *supra* note 102, at 7; PATTON, LITTLEFIELD & SELF, *supra* note 102, at 114.

¹⁰⁵ See 29 U.S.C. § 206(d)(1)(1976). The equal work standard of the EPA was couched in terms of equal skill, effort, responsibility, and working conditions at the behest of industry representatives who felt that the original definition of equal work contained in the Act — jobs requiring equal skills — was vague and incomplete. See *Corning Glass Works v. Brennan*, 417 U.S. 188, 199-200 (1974).

Although it is generally accepted that factors apply equally across jobs within a specified job family, controversy exists whether the factors apply across job families. See NAS REPORT, *supra* note 102, at 6; PATTON, LITTLEFIELD & SELF, *supra* note 102, at 15. If it is established that jobs cannot be compared across job families, it seems that suits for comparable worth will be foreclosed where the greatest job segregation and the greatest pay disparity exist. See NAS REPORT, *supra* note 102, at 11.

¹⁰⁶ NAS REPORT, *supra* note 102, at 1. Job analysis is the process of studying the duties, responsibilities, and conditions of a job for the purpose of preparing a job specification—a

ranking is the most significant step in determining the relative value of jobs. One common method of ranking, the point system, seems particularly adaptable for use in establishing a prima facie treatment case. The point method system involves selection of a set of compensable factors which are further broken down into levels representing a hierarchy of worth.¹⁰⁷ Each level is assigned a given range of points.¹⁰⁸ Each factor is rated separately and is assigned a corresponding number of points for its rated level.¹⁰⁹ The points are totaled to yield a job-worth score.¹¹⁰ Comparison of the scores of male and female jobs with their respective salaries would appear, therefore, to allow an inference of discriminatory intent.

It appears that use of comparative evidence consisting of job evaluation analysis of the positions in question to raise an inference of intentional discrimination will necessarily produce a battle of the experts. An expert retained by the employee presumably will testify that his procedure would evaluate the employee's job at a higher rate and, if the employer has in effect a plan of its own, may attempt to impeach that plan. In rebuttal, the defendant may produce an expert of his own to justify his wage setting policies or to attack the plaintiff's analysis.¹¹¹

Another means by which an employee, predicated his claim on disparate treatment, may attempt to establish discriminatory intent is regression analysis, which seeks to establish proportionate equality.¹¹² Unlike job evaluation analysis, which identifies com-

job description which, in addition, contains the skill, effort, responsibility, and working condition requirements necessary to the fulfillment of the work assignment. *See id.*; PATTON, LITTLEFIELD & SELF, *supra* note 102, at 67. Prior to the writing of the job description, job data is secured, usually through a job questionnaire. The securing of data is critical, since fair job evaluation depends on the accuracy of the underlying facts. PATTON, LITTLEFIELD & SELF, *supra* note 102, at 65. Common items of information include duties, percentage of time devoted to each duty, responsibilities, knowledge and skills needed, performance standards to be met, working conditions, and hazards. *Id.* at 68-69. In the second step of job evaluation, a hierarchy of jobs within the firm is established. *See* NAS REPORT, *supra* note 102, at 1. The setting of wage or salary rates, the final step of job evaluation, utilizes the results of job analysis and job ranking. The rates cannot be determined in a vacuum, however, and hence are usually set after a survey of prevailing market rates and consideration of various other factors, including union demands and company policy decisions. *See id.* at 2.

¹⁰⁷ NAS REPORT, *supra* note 102, at 4.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *See, e.g.,* Thompson v. Boyle, 21 Fair Empl. Prac. Cas. 57 (D.D.C. 1979).

¹¹² For an illustration of the use of regression analysis to prove sex-based wage discrimination in an academic setting, see Greenfield, *From Equal to Equivalent Pay: Salary Discrimination in Academia*, 6 J. LAW & EDUC. 41 (1977).

pensable factors, assigns them a numerical value, and then compares the amount of these factors in two different jobs, regression analysis *quantifies* the relationship between salary and the factors used to measure skill, effort, and responsibility.¹¹³ This method theoretically enables the parties to eliminate from consideration salary differences attributable to the compensable factors.¹¹⁴ It may be inferred, therefore, that any residual wage difference is attributable to sex discrimination.¹¹⁵ After an employee establishes such a residual wage differential, the burden shifts to the defendant to establish a legitimate nondiscriminatory reason for it.¹¹⁶

Thus, in summary, disparate treatment theory may be employed where it is alleged that an employer is paying a woman a lower salary than a similarly situated man simply because she is a woman. Intent, the crucial element of this theory, may be established by direct evidence. Where such evidence is unavailable, circumstantial evidence, such as that provided by job evaluation and regression analysis, generally may be employed to establish intent.

¹¹³ *Id.* at 50. The purpose of regression analysis is to discover a relationship between various explanatory factors, bearing on skill, effort, and responsibility, and the salary for men. *Id.* Once this relationship is discovered, it is then used to make salary predictions for women. *Id.*

To effectively apply the regression model, the plaintiff must isolate variables which logically relate to skill, effort, and responsibility. *Id.* at 52. Experience, education, and ability may be relevant, along with mental effort. *Id.* Responsibility might be measured by administrative and supervisory duties. *Id.* at 53. Although the list of variables may be expanded, the plaintiff should choose between the simplicity of using few variables and the accuracy of using many. *Id.*

¹¹⁴ *Id.* at 50.

¹¹⁵ See *id.* Regression analysis probably would have aided the *Gunther* plaintiffs to establish that a portion of the pay differential between male and female guards could be attributed only to sex discrimination. See *Gunther v. County of Wash.*, 623 F.2d 1303, 1314 & n.11 (9th Cir. 1979), *cert. granted*, 49 U.S.L.W. 3322 (U.S. Nov. 4, 1980) (No. 80-429).

¹¹⁶ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Notably, regression analysis has not been well received in the two courts that have considered it in a salary discrimination context. In *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894 (D.N.J. 1978), *modified*, 476 F. Supp. 335 (D.N.J. 1979), the court acknowledged that the plaintiff had established that women earned less than men at Western by overwhelming statistical evidence. 461 F. Supp. at 913. The court refused, however, to accept the regression analysis of the plaintiff's expert for the purpose of computing back pay, because it found his criteria arbitrary and subjective and his testimony incomprehensible. *Id.* at 914.

In *Presseisen v. Swarthmore College*, 442 F. Supp. 593 (E.D. Pa. 1977), *aff'd*, 582 F.2d 1275 (3d Cir. 1978) (mem.), the plaintiff's expert presented a regression analysis which revealed a statistically significant disparity between the salaries of male and female professors. *Id.* at 614. Although the court stated that this evidence would have stated a *prima facie* case absent evidence to discredit it, the court rejected the analysis because the expert did not include rank, a crucial determinant of salary, as a factor. *Id.* at 615.

Recently, however, the Ninth Circuit, in denying a petition for rehearing in *Gunther*, filed an opinion limiting the use of circumstantial evidence to establish a prima facie case of wage discrimination under Title VII.¹¹⁷ Stating that the effect of its decision would not be to "substitute a 'comparable' work standard for an 'equal' work standard,"¹¹⁸ the court held that when a Title VII plaintiff attempts to establish a prima facie case based solely on job comparisons, the equal work standard will apply.¹¹⁹ The Ninth Circuit did not preclude establishment of a prima facie case of sex-based wage discrimination based on "some other theory compatible with Title VII,"¹²⁰ but the court declined to suggest what theories might be feasible.¹²¹ Although noting that a comparable work standard would not necessarily be irrelevant in proving discrimination under an alternative theory, the court emphasized that, without more, such evidence would not be sufficient to establish a prima facie case.¹²²

It is suggested, however, that the Ninth Circuit's restriction on the use of circumstantial evidence in Title VII cases is not mandated by the statute's legislative history. Although Congress, in enacting the EPA, disapproved of a comparability standard,¹²³ no such limitation appears in the legislative history of Title VII and, indeed, Title VII's broad proscription against wage discrimination based on sex militates against such a restrictive view. Moreover, the *Gunther* dicta ignores the apparent utility of comparative evidence to establish a Title VII claim.

Adverse Impact

The Supreme Court has held that employment practices which impact adversely on particular protected groups violate Title VII if not justified by a showing of business necessity.¹²⁴ In such cases proof of intent is not necessary to establish a violation of the statute, since Title VII is addressed to the consequences of employ-

¹¹⁷ 623 F.2d 1303, 1317 (9th Cir. 1980).

¹¹⁸ *Id.* at 1321.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ See 109 CONG. REC. 9197 (1965) (remarks of Rep. Goodell).

¹²⁴ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

ment practices as well as their motivations.¹²⁵ Hence, where adverse impact is shown, liability under Title VII cannot be avoided by introducing evidence of lack of discriminatory motive on the employer's part.¹²⁶

Adverse impact theory is no doubt relevant in cases where an employer uses a device such as a scored test to select applicants, and the test operates to the detriment of a protected group either because of inherent biases in the test itself or because of an educational deficiency on the test taker's part.¹²⁷ It is submitted that the theory is particularly applicable to situations where job evaluation procedures adversely affect women's wages.¹²⁸ Indeed, while job evaluation may aid a victim of wage discrimination to establish intent under a treatment theory, the procedure may prove to be the source of the discrimination under an impact theory because, while neutral on its face, it has the potential at each stage¹²⁹ for individual bias and arbitrariness, albeit unintentional, on the part of the evaluator.

Three aspects of job evaluation seem particularly susceptible to bias: writing the job description, selecting the compensable factors, and weighting such factors.¹³⁰ Since the job description forms the basis for the subsequent evaluation,¹³¹ it must be preceded by a thorough job analysis if the evaluation is to be objective.¹³² Job analysis itself is susceptible to bias because the value system and the perceptions of the analyst influence not only what information is collected, but also the manner in which it is collected.¹³³ Conse-

¹²⁵ *Id.* at 432.

¹²⁶ *Id.*

¹²⁷ *Id.* at 436. In *Griggs*, the Supreme Court observed that job testing is not forbidden by Title VII; rather, the Civil Rights Act demands that if a test is used, it "must measure the person for the job and not the person in the abstract." *Id.*

¹²⁸ See Blumrosen, *supra* note 39, at 462-63.

¹²⁹ See note 106 and accompanying text *supra*.

¹³⁰ See NAS REPORT, *supra* note 102, at 35; Blumrosen, *supra* note 39, at 434-41; Remick, *Strategies for Creating Sound, Bias-Free Job Evaluation Plans* in INDUSTRIAL RELATIONS COUNSELORS, INC., JOB EVALUATION AND EEO: THE EMERGING ISSUES 85-91 (1978); Thomsen, *Eliminating Pay Discrimination Caused by Job Evaluation*, PERSONNEL, Sept.-Oct. 1978, at 16-18.

¹³¹ PATTON, LITTLEFIELD & SELF, *supra* note 102, at 65; Blumrosen, *supra* note 39, at 435.

¹³² PATTON, LITTLEFIELD & SELF, *supra* note 102, at 65.

¹³³ See Blumrosen, *supra* note 39, at 435. Inaccuracies can be caused intentionally by emphasizing duties seldom performed, or by making a job appear more important than it really is. *Id.* Unconscious bias may also creep in, causing the analyst to make certain jobs appear harder than they really are. *Id.* Additionally, if the analyst depends on information

quently, any biases or inaccuracies in the job analysis may be carried forward into the job description, and ultimately may be reflected in the qualifications for the job as established by the job description.¹³⁴

The selection of factors to be evaluated also may represent a source of undervaluation of female wages because evaluators tend to assign points to characteristics found primarily in male-dominated jobs.¹³⁵ For example, "effort" tends to be defined in terms of the strength needed to do heavy work, without regard for the repeated lifting of light objects which tends to occur in female-dominated jobs.¹³⁶ Measurements of "manual skill," moreover, frequently emphasize ability to handle tools rather than manual dexterity, thereby downgrading the fine assembly work performed largely by women.¹³⁷ In addition, in assessing responsibility, evaluators tend to give credit to responsibility for property, a characteristic of male jobs, but downplay or ignore the responsibility for people, which is part of many female jobs.¹³⁸

The determination of the weight to be assigned to the various compensable factors, the third step in job evaluation, is also susceptible to the biases of the evaluator. When factors are weighted through the use of a point system, pay disparities occur because the same biases that operated in the selection of factors also influence the weight to be given to them.¹³⁹ If effort, for example, is

provided by a supervisor, the supervisor's attitudes and biases may be unconsciously recorded by the analyst. For example, most executives are incapable of giving a complete and accurate description of tasks performed by their secretaries, because a good secretary frequently will take care of administrative detail without bothering the boss. NAS REPORT, *supra* note 102, at 45.

¹³⁴ Blumrosen, *supra* note 39, at 436. Obviously, if the job description is written by the same person who did the job analysis, or by someone with a similar point of view, it is unlikely that the job description will contain any information not provided by the job analysis. *Id.*; see NAS REPORT, *supra* note 102, at 46.

¹³⁵ Remick, *supra* note 130, at 85.

¹³⁶ See *id.* at 86. It has been suggested that a bias-free evaluation system might give points for total weight lifted during the day. *Id.* Job evaluation systems not only ignore the type of effort typically found in women's jobs, NAS REPORT, *supra* note 102, at 38, they also tend to weight male effort more heavily than skill, thus reflecting traditional attitudes toward male jobs involving effort. Thomsen, *supra* note 130, at 16; see, e.g., *Hodgson v. Daisy Mfg. Co.*, 317 F. Supp. 538, 547 (W.D. Ark. 1970), *modified per curiam*, 445 F.2d 823 (8th Cir. 1971).

¹³⁷ NAS REPORT, *supra* note 102, at 38.

¹³⁸ Remick, *supra* note 130, at 87. A bias-free job evaluation system arguably would include a range of points from routine "people" responsibility, such as daycare, to life and death responsibility, such as nursing.

¹³⁹ NAS REPORT, *supra* note 102, at 39. Personal bias of the evaluator is not the only

determined from the perspective of a male job, an evaluator may conclude that a female job requires no effort since it entails a different kind of effort.

Although the Supreme Court has not yet specified the quantum of adverse impact that is necessary to establish a prima facie case,¹⁴⁰ it is submitted that in a wage discrimination suit the employee's burden should be discharged upon proof that an inaccurate job description has adversely affected the selection of factors to be weighted. Alternatively, if it can be shown that the selection of factors is prejudicial, it should not be necessary to show that a job description is inadequate. Indeed, factor selection probably has the greatest influence in the evaluation process, since a factor must be present in order to be weighted.

Defenses to Wage Discrimination Actions

Section 703(h) of Title VII¹⁴¹ and section 206(d)(1) of the EPA,¹⁴² incorporated into Title VII by the Bennett Amendment,¹⁴³ exempt certain conduct of the employer from the ban on discrimination. Often raised by the employer as affirmative defenses to rebut the employee's prima facie case of discrimination, these exemptions include seniority systems, differences based on quality or quantity of production, or differences based on any factor other than sex.¹⁴⁴ Employers have also raised certain defenses not enumerated in either statute that might dilute the value of the Act and Title VII if endorsed by the courts.

In suits under the Act, employers have attempted to raise the economic costs of employing women as a justification for a wage differential based on sex.¹⁴⁵ Cases construing the Act have consistently rejected this defense as violative of the explicit mandate of the statute.¹⁴⁶ The cost justification defense likewise has been re-

cause of inequitable factor weighting. Different job evaluation systems tend to put different amounts of emphasis on various factors. *Id.* at 42. Thus, problems in factor weighting may arise if job evaluation systems do not include factors found in female jobs, or if those factors are not given reasonable weight relative to those of male jobs. Remick, *supra* note 130, at 89.

¹⁴⁰ B. SCHLEI & P. GROSSMAN, *supra* note 87, at 35 (Supp. 1979).

¹⁴¹ 42 U.S.C. § 2000e-2(h) (1976).

¹⁴² 29 U.S.C. § 206(d)(1) (1976).

¹⁴³ 42 U.S.C. § 2000e-2(h) (1976).

¹⁴⁴ *Id.*; 29 U.S.C. § 206(d)(1) (1976).

¹⁴⁵ See Blumrosen, *supra* note 39, at 447-48.

¹⁴⁶ *E.g.*, Corning Glass Works v. Brennan, 417 U.S. 188, 204-05 (1974); Brennan v. Vic-

jected under Title VII, on the ground that employers are required to treat members of protected groups as individuals rather than as components of a larger class.¹⁴⁷ Thus, while it may be true that the costs of employing women are generally higher because of factors such as greater turnover and more frequent leaves of absence, an individual woman who works in the same job for several years without a single absence cannot be paid a lower salary based upon such assumptions and generalizations.¹⁴⁸

Another defense frequently raised by employers is that market forces of supply and demand require them to pay higher wages to male employees to obtain their labor.¹⁴⁹ In cases under the Act, it has been held that Congress did not intend to protect differentials based on such factors.¹⁵⁰ The defense has also arisen in two suits under Title VII. Although the plaintiffs in both cases argued unsuccessfully that the Bennett Amendment did not incorporate the equal work standard of the EPA into Title VII, the effect of supply and demand on discrimination was the central issue.¹⁵¹ In each case, the plaintiff employees, members of an all-female occupational class of workers, alleged that the employer paid higher wages to a predominantly male occupational class for work that was equal in value.¹⁵² The employers defended on the ground that the market forced them to pay higher wages to the men in order to attract them.¹⁵³ Both courts upheld the validity of the wage differentials, holding that Congress did not intend Title VII to abrogate the law of supply and demand,¹⁵⁴ or to eliminate the effect of other factors, such as the collective bargaining process, that determine

toria Bank & Trust Co., 493 F.2d 896, 902 (5th Cir. 1974); *Brennan v. City Stores, Inc.*, 479 F.2d 235, 241 n.12 (5th Cir. 1973); *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719, 726 (5th Cir. 1970). *But see* *Hodgson v. Robert Hall Clothes*, 473 F.2d 589 (3d Cir.), *cert. denied*, 414 U.S. 866 (1973).

¹⁴⁷ See *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708-10 (1978). See also *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 717-18 (7th Cir. 1969).

¹⁴⁸ *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. at 708.

¹⁴⁹ See *Christensen v. Iowa*, 563 F.2d 353, 355-57 (8th Cir. 1977); *Lemons v. Denver*, 17 Fair Empl. Prac. Cas. 906, 911 (D. Colo. 1978), *aff'd*, 620 F.2d 228 (10th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3228 (U.S. Oct. 6, 1980) (No. 80-82).

¹⁵⁰ *Christensen v. Iowa*, 563 F.2d at 356; *Lemons v. Denver*, 17 Fair Empl. Prac. Cas. at 909-10.

¹⁵¹ See *Christensen v. Iowa*, 563 F.2d at 355-56; *Lemons v. Denver*, 17 Fair Empl. Prac. Cas. at 909-11.

¹⁵² 563 F.2d at 354; 17 Fair Empl. Prac. Cas. at 910.

¹⁵³ 563 F.2d at 354; 17 Fair Empl. Prac. Cas. at 910.

¹⁵⁴ 563 F.2d at 356; 17 Fair Empl. Prac. Cas. at 909.

wage rates.

The difference in the analysis of the market forces defense under the EPA and under Title VII appears to be related directly to the fact that equal jobs are being compared under the EPA, while Title VII allows plaintiffs to compare different jobs. Logic dictates that the defense should not be allowed under the Equal Pay Act because there usually is no reason to pay men a higher wage to perform a job because of a scarce male labor supply when women are available to perform the same job.¹⁵⁵ When a pay disparity between different jobs is at issue, however, supply and demand become more relevant because traditional job segregation between the sexes has caused certain jobs to be composed of predominantly male or female workers. Indeed, it has been argued that existing supply and demand forces are directly attributable to discriminatory job segregation which historically crowded females into a small number of occupations, depressed their wages, and artificially inflated wages in all-male jobs.¹⁵⁶ Consequently, the argument continues, an employer's reliance on market forces in setting wage rates necessarily discriminates against women in violation of Title VII.¹⁵⁷

Notwithstanding this assertion, however, it is submitted that a bona fide market justification for disparate wages between jobs equal in value effectively rebuts the inference of discrimination raised in the prima facie case. While it may be true that market forces are the result of historical job segregation, reliance on the market rate does not constitute present discrimination that can be attributed to the defendant employer. Because the supply of qualified workers becomes a more critical factor as jobs become less similar, it appears that the market justification defense will limit wage discrimination actions to jobs within the same job family. The more alike the jobs at issue are, the less likely it will be that labor market factors will influence pay rates. It is suggested, moreover, that judicial equalization of wages in dissimilar jobs affected by supply and demand is not the solution to sexual pay disparities.

¹⁵⁵ See *Corning Glass Works v. Brennan*, 417 U.S. 188, 205 (1974); EEOC Dec. No. 70-112, 1973 EEOC Dec. (CCH) ¶ 6,108 (Sept. 5, 1969).

¹⁵⁶ See Stevenson, *Relative Wages and Sex Segregation By Occupation* in C. LLOYD, SEX, DISCRIMINATION, AND THE DIVISION OF LABOR 175, 175 (1975).

¹⁵⁷ See NAS REPORT, *supra* note 102, at 5 (pay rates are determined by referring to the market system out of a desire, whether conscious or unconscious, to maintain the status quo); Thomsen, *supra* note 130, at 18.

Rather, such disparities can best be remedied by sexual integration of segregated jobs. The provisions of Title VII banning discrimination in hiring and promotion will facilitate this end by breaking down barriers erected by the employer.¹⁵⁸

CONCLUSION

Although envisioned as a pervasive attack on discriminatory employment practices, Title VII, by virtue of a restrictive interpretation of the Bennett Amendment, for more than a decade had been interpreted as inapplicable to wage discrimination actions not predicated on a claim of equal pay for equal work. Only recently have courts begun to recognize that the scope of the provisions extends beyond violations redressable under the EPA and, indeed, has the potential to provide a remedy for some of the more subtle forms of discrimination in compensation to which women have been subjected. To date, however, the courts which have endorsed this liberal construction of Title VII have declined to propose alternate theories under which plaintiffs may present a *prima facie* case of wage discrimination. Therefore, contemplating the continuation of the judicial trend to expansively interpret the statute, this Note has attempted to suggest theories—consistent with Title VII caselaw—under which claims that fail to meet the restrictive equal work standard of the EPA may be brought. It is submitted that judicial acceptance and development of these and similar theories is required if sexually discriminatory compensation practices, to which Title VII is in part addressed, are to be eradicated.

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¹⁵⁸ See 42 U.S.C. § 2000e-2(j) (1976). While Title VII prohibits an employer from discriminating against a protected group in hiring or promotion, it does not force an employer to institute an affirmative action program to remedy existing imbalances. *Id.* Thus, an employer, in choosing between two equally qualified male and female candidates, would not be forced to choose the female over the male.